

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF ALABAMA

ROMIE HARRIS, JR., AMY HARRIS,
RUBY FRANCIS FOWLER, MARY
LOIS GREEN, JAMES THOMAS,
LULA THOMAS and JANIE BUFORD,

Plaintiffs,

V.

CIVIL ACTION NO. 2:06-CV-00956

PACIFICARE LIFE AND HEALTH
INSURANCE COMPANY, ROBERT D.
BELL, ELIZABETH R. CLARK,
WILLIE C. TILLIS, and Fictitious
Defendants A through Z, those
corporations, partnerships, LLC's,
individuals or other entities who conduct
contributed to the damages claimed
herein whose names are not yet known to
Plaintiffs but will be substituted by
amendment when ascertained,

Defendants.

**PACIFICARE LIFE AND HEALTH INSURANCE COMPANY’S
RESPONSE TO PLAINTIFFS’ MOTION TO REMAND**

COMES NOW PacifiCare Life and Health Insurance Company, (“PacifiCare”), and files this Response to Plaintiffs’ Motion to Remand:

I.

1.1. On October 20, 2006, PacifiCare properly removed this action from the Circuit Court of Bullock County, Alabama pursuant to 28 U.S.C. § 1331 because Plaintiffs’ claims herein all raise substantial questions of federal law and/or arise under the federal Medicare Act, 42 U.S.C. 1395w-221 – w28, as amended by the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (“MMA”), and, accordingly, are completely preempted by federal law.

1.2 On November 16, 2006, Plaintiffs filed a Motion to Remand complaining that PacifiCare's removal was improper on two grounds. First, Plaintiffs assert that removal was procedurally defective because Defendant Robert D. Bell did not join in the removal "even though he had been served." (Motion at ¶ 4). This ground fails because the uncontroverted evidence establishes that Defendant Bell does not reside at the address listed in the Complaint and at which service was attempted, and has not been served or otherwise received a copy of the civil summons and complaint. (*See* Affidavit of Robert Bell, attached to PacifiCare's Memorandum of Law filed contemporaneously herewith, at ¶ 2). Thus, Defendant Bell was not required to join in PacifiCare's removal.

1.3 Second, Plaintiffs claim that PacifiCare has not met its burden of demonstrating a substantial question of federal law or complete preemption under the Medicare Act necessary to establish federal subject matter jurisdiction. (Motion at ¶¶ 5-6). This basis for remand is no better than the first, as PacifiCare demonstrates in its accompanying Memorandum of Law: not only do Plaintiffs' claims necessarily raise substantial questions of federal law under the Medicare Act's statutory and regulatory framework, but federal preemption exists as to all of Plaintiffs' claims. To the extent that any state law claims survive, this Court should exercise pendent jurisdiction over them.

1.4 As PacifiCare's removal was proper, the Court should deny any request by Plaintiffs for PacifiCare to pay their costs incurred due to the removal. Alternatively, if this Court finds that remand is proper, PacifiCare requests that the Court exercise its discretion and deny any award of costs due to the reasonable and good faith assertion of removal jurisdiction by PacifiCare.

WHEREFORE, PacifiCare Life & Health Insurance Company respectfully requests that the Court deny Plaintiffs' Motion to Remand, and for any other relief to which it is entitled.

Respectfully submitted,

s/ William C. McGowin

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of December, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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and I hereby certify that I have mailed by U. S. Postal Service the document to the non CM/ECF participants:

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/s/ William C. McGowin

Of Counsel